No. 3665

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BINGER STEWART HERINE, also known as Binger Stewart Horine,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

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I

STATEMENT OF THE CASE

The plaintiff in error was found guilty on the first count of an information filed against him in the District Court of the United States for the Northern District of California, in which it was charged that on June 20, 1920, at San Francisco within the jurisdiction of the Court, he did "*unlawfully,* wilfully and knowingly, *in violation of* section 21 of Title II of the Act of October 28, 1919, known as the 'National Prohibition Act,' maintain a common nuisance in that he did unlawfully, wilfully and knowingly

keep on the premises situated at 457 Ellis Street, known as Summerville Apartments, to-wit, Rooms 3, 4 and 5, certain intoxicating liquor, to-wit, sherry wine, and port wine containing one-half of one per cent or more alcohol by volume, and then and there fit for use for beverage purposes."

He was found not guilty on two other counts of the information charging unlawful sales of intoxicating liquors at the same place.

At the trial the Government submitted testimony in support of the allegations of the information as appears from page 41 to 55 of the transcript, and which is too long to be quoted here. But it was shown generally that at about 1:30 o'clock in the morning of June 20, 1920, a telephone call came to the Central Police Station of San Francisco, summoning the police to the Summerville Apartments at 457 Ellis Street; that thereupon four police officers, including one Deligne, went to the Apartments. When they reached apartments 3, 4 and 5 they found the doors of rooms 3 and 5 open and could see from the outside numerous bottles on a sink and table and glases, etc., some full and some empty and a few kegs, and there were certain men and women in the apartments drinking liquor, and loud laughter and talking. The plaintiff in error stepped forward and said he was the owner of the apartments; that he had been manager of the Cadillac Bar at another place, that that was a saloon, and he then stated "I am still in the business and not in it for my health. You men can see

what I am doing, no use trying to fool you people." He was dispensing wine to the persons present, serving it in glasses on a tray. Two of the persons present stated that they had paid 25c a drink for the wine, and plaintiff in error heard this statement and admitted it. Some at least of the people present were intoxicated. Plaintiff in error then stated that he did not live at that place, that he lived in another apartment at the Adair Hotel at 445 Ellis Street. The police officers then arrested plaintiff in error and took the kegs and bottles, which contained sherry wine, to the city prison. There were several kegs and bottles of the wine which it was admitted contained more than one-half of one per cent of alcohol by volume and was shown to be fit for beverage purposes, and which liquor was in the immediate possession of plaintiff in error at the apartments, plainly visible to all concerned.

The plaintiff in error was sentenced on the said conviction to be imprisoned for three months in the county jail of San Francisco.

On September 23, 1920, the defendant filed his verified petition in the district court asking for an order directing the said Deligne and also John L. Considine, District Prohibition Enforcement Officer, to return to him the said liquors. The petition, although verified, was meager in its allegations. It is embraced in the Bill of Exceptions and appears in the transcript at page 29. There was also

filed by him at the same time an unverified so called Bill of Particulars, which adds little to the statement of facts. In response to the petition and an order to show cause issued thereon, the said Deligne filed his verified return, wherein he set forth substantially the facts and incidents of the arrest as above stated, set forth that he is and was at all times concerned a police officer of the city and county of San Francisco and at all times acted as such and further that the said Considine as District Prohibition Officer, or otherwise, had not, nor had any official of the Government, ever seized or had possession of or retained any of the said wine. He showed further that at the time he arrested the defendant, he, the defendant, stated that his residence was then at 445 Ellis Street as above set forth, and that while he, the defendant, owned the liquors, he had no permit to move them to the Summerville Apartments, and also, that he, the said defendant had stated at the said time to the officers that he was selling the wine. The application of defendant for the return of the liquors was submitted on the said petition, bill of particulars and return of Officer Deligne, and was by the Court denied.

The plaintiff in error urges before this Court

(a) That the Court erred in denying his petition for the return of liquors;

(b) That the information upon which he was convicted does not charge any crime; and

(c) That the evidence was insufficient to justify the verdict.

II.

ARGUMENT.

A. THE COURT PROPERLY DENIED THE PETITION OF PLAINTIFF IN ERROR FOR THE RETURN OF THE LIQUORS. NO PROPER SHOWING WAS MADE IN SUPPORT OF THE PETITION AND THE COURT'S ORDER COULD NOT PROPERLY HAVE BEEN OTHERWISE.

(a) The showing was conclusive that the liquors were seized by the police officers of San Francisco and not by the Government, and that the District Prohibition Officer never seized or had in his possession any of the said liquors, nor had any official of the Government. Accordingly, the District Court would have no jurisdiction to direct the police department of the city and county of San Francisco to return the wine.

Weinstein v. *Attorney-General,* 271 Fed. 674.

If the liquors had been taken by private parties or by any persons other than Government officers, even if taken in violation of defendant's rights, it would not have prevented their use in evidence. The Government would have had the right to bring the liquors in from the custody of such third persons by subpoena duces tecum.

Burdeau v. *McDowell,* Advance Opinions U. S. Supreme Court 1920-21, page 683.

The burden was on plaintiff in error to show a case for the granting of his motion, and he failed to show that the Government was concerned in taking the liquors, while respondent showed that it had no part therein. In such case the order for the return was properly denied and the articles so taken were properly received in evidence.

(b) Even had Deligne been an official of the Government, or had the Government seized the liquors on the occasion in question, the seizure would have been entirely proper without a search warrant. The law was being violated, the officers were summoned to the apartments to prevent the disturbance of the peace, which would have been a violation of the state law, and having entered the apartments in response to the summoning, they proceed along the hall to defendant's apartments, found the doors open, the public peace being disturbed, and then and there saw the defendant in unlawful possession of intoxicating liquors and saw him make sales thereof, and heard his admissions that he was selling and that he was in the business of selling and that he did not live there. In such a conjuncture there was but one thing for the officers to do, to wit, arrest the defendant and seize anything on his person or in his immediate presence and under his control which was contraband or used in violating the law. Such seizure would constitute one of the well known exceptions to there being a necessity for a search warrant.

Weeks v. *U. S.*, 232 U. S. 383, 58 L. ed. 652, 655.

(c) Moreover, the order refusing to return the liquors in no manner injured the plaintiff in error, for subsequently, when the liquors were offered in evidence at his trial, he made no objection or took no exception thereto (See Trans. p. 53). In such case it must be deemed that he consented to the use of the liquors in evidence. And at that stage of the case, as will be apparent from a cursory reading of the record, the fact that the plaintiff in error had at the apartments intoxicating liquors which he was selling unlawfully had been testified to by everyone of the Government's witnesses and this without objection or exception. Accordingly, it must be conceded that the first point urged by plaintiff in error is not well taken.

The answer to these considerations made by plaintiff in error seems to be that since the jury found him not guilty of making the sales, that therefore that portion of the return must, for the purpose of this argument, be disregarded. But it must be clear that this is non sequitur. The motion was not to be decided by the jury but by the Court upon evidence *then* before it, and if its action was then correct under the showing, it did not thereafter become erroneous merely from the fact that the jury saw fit to find to the contrary. The exception here urged is as to the action of the Court previous to the trial on a matter not pending before the jury but to be decided by the Court alone. And in any matter properly to be decided by the Court upon testimony, such as preliminary motions,

showing upon voir dire as to the admission of evidence during the trial, the Court would have the right and it would be its imperative duty to reach conclusions of fact upon conflicting testimony upon its own judgment and not that of the jury.

The further contention is made in the same connection that the return contains no proper denial that the premises in which the liquor was found were the lawful residence of plaintiff in error. It may be noted, however, that while the burden was on the plaintiff in error in prosecuting his motion, he himself did not show in his verified petition that the premises in question were his residence. (Trans. p. 29). Such a statement appearing in the so-called Bill of Particulars was not verified. But on the other hand, the statements in the return of Officer Deligne were ample to prove that the premises were not the bona fide residence of plaintiff in error. Such a statement was made by Deligne on information and belief it is true, but the *information* was the statement of plaintiff in error himself, which would have amounted to evidence independent and proper in itself, and not hearsay. (Trans. p. 38).

B. THE FIRST COUNT OF THE INFORMATION UPON WHICH PLAINTIFF IN ERROR WAS CONVICTED IS AMPLY SUFFICIENT TO CHARGE A CRIME AGAINST THE UNITED STATES. IT SHOWS BY PROPER AVERMENTS HIS VIOLATION OF SECTION 21—

THE NUISANCE SECTION—OF TITLE II OF THE NATIONAL PROHIBITION ACT.

The charge follows the language of the statute with sufficient description to inform the defendant of the nature of the offense charged and the cause of the accusation and with such certainty that he could prepare his defense and plead the judgment in bar of any subsequent prosecution for the same offense. The situation is not dissimilar to that which arose in the case of *Young* v. *U. S.*, 272 Fed. 967, wherein this Court upheld an information based on section 3 of Title I of the same Act, which was the nuisance section of the portion thereof relating to war prohibition, and which is generally similar to the nuisance section here involved. We think the authority in question is conclusive as to the sufficiency of the first count of the information in the case at bar.

Counsel for plaintiff in error takes note of the provision of the Act that the burden of proof shall be upon the possessor to prove that the liquor was lawfully acquired, possessed and used, but he urges that this provision sets forth a rule of evidence and not of pleading. But he overlooks that section 32 of Title II of the same Act makes a similar regulation as to pleading. It is there provided that in any affidavit, information or indictment, etc., it shall not be necessary to give the name of the purchaser or to include any defensive, negative averments; but that it shall be sufficient to state that the act com-

plained of was then and there prohibited and unlawful. The count of the information measures up to these requirements, especially in view of the consideration that no motion or demurrer was directed to the information, and that under the provisions of section 1025 of the Revised Statutes mere objections to form can not be taken after verdict. The provisions of the law dispensing with the necessity of including defensive, negative averments have been upheld and applied by the Circuit Court of Appeals of other circuits in the following cases:

Rothman v. *United States,* 270 Fed. 31, 34;
Wallace v. *United States,* 243 Fed. 300, 304;
Fyke v. *United States,* 254 Fed. 225;
Melanson v. *United States,* 256 Fed. 785.

And this Court in the case of *Baender* v. *U. S.,* 260 Fed. 832, in a case of a prosecution for the unlawful possession of steel dies in likeness and similitude to dies for United States coin, held that where a criminal intent is to be inferred from unlawful possession, it need not be averred in the indictment.

In regard to counsel's further contention that it is beyond the power of Congress to make the mere possession of liquor a crime, it may be answered that it has not done so; that under the Volstead Act all proper or innocent possession of intoxicating liquors is provided for and allowed. The statute does not *prohibit* such possession; it *merely* regulates it. And it can not be reasonably contended that since Congress has the conceded police power under the

Eighteenth Amendment to prohibit the sale or manufacture or transportation of intoxicating liquors for beverage purposes, it has not, as incidental to such power, the further power to regulate innocent possession. This principle is well established and illustrated in such cases as

Purity Extract & Tonic Co. v. *Lynch,* 226 U. S. 192, 57 L. ed. 184;

Jacob Ruppert v. *Caffey,* 251 U. S. 264, 64 L. ed. 260; and

Rhode Island v. *Palmer,* 64 L. ed. 946, 978.

C. THE EVIDENCE WAS AMPLY SUFFICIENT TO JUSTIFY THE VERDICT.

It may be stated *in limine* that plaintiff in error is not in a position to raise any such question. He did not make any motion for a directed verdict at the conclusion of the testimony. Such a motion was made by him, but it was made at the beginning of his own testimony and being denied, it was not renewed at any subsequent time, although plaintiff in error thereafter testified at length and then two witnesses were recalled in rebuttal by the Government (Trans. p. 52). In such case the motion was waived by the further introduction of evidence, and the failure to renew it at the close of the testimony prevents the plaintiff in error from questioning the sufficiency of the evidence.

Clark v. *U. S.,* 245 Fed. 112, 113;
Hale v. *U. S.,* 242 Fed. 891.

But if the point had been properly raised, it would have no merit. It is said, for example, that the un-

contradicted evidence of the defendant shows that the apartment in which the arrest was made and the liquor found, was his actual and bona fide residence. It is sufficient to point to the following testimony of the Government's witnesses, viz.: Officer Deligne said, p. 47, "The defendant stated to me that he lived at the Adair Hotel, 445 Ellis Street, Room 214." Officer Ohnimus states, p. 44, "I asked him if he lived at that place. He said no, that he lived in another apartment there, in a house adjoining there. I believe it was the Adair Hotel." Officer Brouders states, p. 47, "The defendant said he lived in the Adair Hotel, that is a few doors down from the Summerville." Witness Howard, the manager of the Adair Apartments, states, p. 50, "I know Mr. Herine, the defendant. He was there when I went in on February 15, 1919. He occupied Room 214. The number of the Adair is 445 Ellis Street. He has remained there as a guest in my hotel since that time and is yet." It was further shown by the officers, p. 55, that the appearances of the apartment at the Summerville did not indicate that any one resided or lived there.

Further contention is made on the testimony in that it is insufficient to establish that defendant was keeping a common nuisance and at the most shows possession and use of liquor on one day and that before the place can be a nuisance it must have acquired a status. And certain cases are cited including a decision by a Federal district court in Missouri. The authority so cited related to the civil action in equity

to abate a nuisance. There may be a limit to the power of Congress to authorize the familiar action in equity to abate a particular status calling it a nuisance and then enforce the decree by a contempt proceeding to be determined without a jury. But it is one thing to authorize such a proceeding as affecting a given situation and quite another thing to declare a particular act a crime. Congress has distinctly declared that one who maintains a building, structure or place where intoxicating liquor is kept in violation of the National Prohibition Act is guilty of a crime. It would have power to declare such a crime in the case of a single act; it need not be continuous or recurrent. While it might not have power to make use of the equitable proceeding to abate in such case. The latter situation may be given attention when it arises. It is sufficient in the instant case to point out that whether the law be as counsel contends, the proof is ample to show the guilt of the defendant in establishing and maintaining a status and in doing continuous acts. We cite the Court the following portions of testimony in that behalf:

Officer Deligne testified (Trans. p. 42):

> "There were several kegs, one full, and two partly full, and two or three were empty. There were ten bottles full altogether, full of port and sherry wine. I asked who was the owner of these apartments, and Mr. Herine stepped forward and said that he was. He stated that he had been manager of the Cadillac Bar at Eddy and Leavenworth Streets for seven years, that was a saloon, and he stated, 'I *am still* in the business,

and not in it for my health; *you men can see what I am doing;* no use trying to fool you people!' "

Officer Ohnimus testified (Trans. p. 44):

'I asked the defendant what he was doing there and he stated, 'There is no necessity of lying; I will come clean; *I am selling this stuff.'* I asked him if he had lived at that place; he said no, that he lived in another apartment there, in a house adjoining there; I believe it was the Adair Hotel."

And Officer Brouders testified (Trans. p. 46):

"The defendant said, 'You police people have got me; there is no use,' some words to that effect. He said, 'I have been in the saloon business over in the Cadillac Bar there for five or six years, and still in the business.' "

It thus appears that the defendant's enterprise had acquired a status. It was intended by him to be and it was "habitual," "continuous" and "recurrent."

It thus appears that in that connection the defendant was given all the rights to which he was entitled, that is to say, the right to persuade the jury, if he could, not to draw obvious inferences from the established facts.

We submit that the judgment of conviction of plaintiff in error should be affirmed.

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